

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-2049

77 - 2042

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NOV 1 1977

CALENDAR No. 326

THOMAS LENTINI,

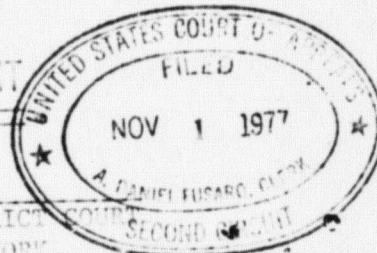
PETITIONER/APPELLANT

V

UNITED STATES OF AMERICA,

RESPONDENT/APPLEE

REPLY BRIEF OF THE APPELLANT



ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

The argument before this Court is essentially:

- I. THE DISTRICT COURT ERRED BY FAILING TO CONDUCT AN EVIDENTIARY HEARING ON THE APPELLANT'S MOTION TO VACATE SENTENCE SINCE THE RECORDS AND FILES OF THE CASE CONCLUSIVELY SUPPORTED THE ALLEGATION THAT THE COURT FAILED TO COMPLY WITH RULE 11, F.R.Cr.P.

In support of the argument the Appellant states that the Court below failed to comply with Rule 11, primarily by:

- (1) Failing to inform the Appellant that a Special Parole Term

was Statutorily required to be imposed in addition to any other sentence of imprisonment.

(2) By failing to inform Appellant that the imposition of the sentence under 18 USC 4202 although concurrent with the existing 11 year sentence, would nullify the early parole provisions of 18 USC 4208(a)(2) of the existing sentence.

(3) Failing to abide by the bargain that the sentence would not exceed the sentence of 11 years the Appellant was then serving, as agreed to by Appellant, Appellant's Counsel and the Government.

Therefore, due to the Court's failure to comply with Rule 11, F.R.CrP., the Petitioner was deprived of his Fifth Amendment Right to Due Process of Law, and his right not to testify against himself, and the plea was not a voluntary waiver of his Constitutional Rights.

The Government's Brief argues that the Appellant's allegations are in error; stating:

(1) Appellant failed to demonstrate that he was prejudiced by the Court's failure to advise him of the terms of the special parole.

(2) The District Court was not required to advise Appellant of the regular parole provisions of 18 USC 4202.

(3) The District Court properly advised the Appellant of the possible prison terms which could be imposed.

(4) Predictions by counsel unsupported by an affidavit has not any bearing on the sentence and the plea's validity.

The Government makes various and sundry statements, supported by case law appropriate for their arguments, however, the Government fails to reach the issue before the Court.

Rule 11, F.R.Cr.P. as it stood at the time of the plea, stated:

"The Court may refuse to accept a plea of guilty, and shall not accept such plea..without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea...The Court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

The language of the rule leaves no doubt what-so-ever as to the obligation of the Court:

"THE COURT SHALL NOT ACCEPT SUCH PLEA WITHOUT FIRST ADDRESSING THE DEFENDANT PERSONALLY AND DETERMINING THAT THE PLEA IS MADE

1. VOLUNTARILY
2. (WITH AN) UNDERSTANDING OF THE NATURE OF CHARGES.
3. INFORMED OF THE CONSEQUENCES OF THE PLEA
4. THAT THERE IS A FACTUAL BASIS FOR THE PLEA.

The rule does not provide for another judge in a prior sentence personally informing the Petitioner of the consequences, or making the determination that the plea is voluntary, nor does the rule provide for compliance with the rule AT SENTENCING, AFTER THE PLEA HAS BEEN ACCEPTED. The Rule further does not provide for someone else assuming the duties of the Court by informing the defendant, for it plainly states:

"THE COURT SHALL NOT ACCEPT SUCH PLEA WITHOUT FIRST ADDRESSING THE DEFENDANT PERSONALLY....."

The Proceedings noted by the Government as a proof of compliance with the rule, are noted in the Brief of Appellee on page 4,5,6, taken

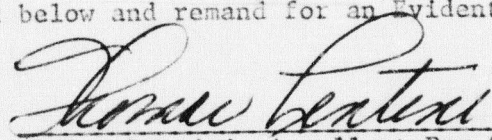
from the Transcript pages TR-3,4,5,6.

Federal courts must comply with the procedural safeguards of Rule 11 to ensure that the waiver of fundamental rights by the guilty plea is voluntary, knowing and intelligent. The Records heretofore noted above conclusively show that the procedural requirements were not sufficient to warrant that the plea of guilty should be sustained. The basic requirement is that the defendant understand the existence of any mandatory minimum penalty and the maximum penalty for the offense BEFORE THE PLEA IS ACCEPTED. Calabrese v. United States, 507 F. 259, 260 (1st Cir. 1974); Otero-Rivera v. United States, 494 F.2d 900, 903. This Circuit in Ferguson v. United States, 513 F.2d 1011 (2d Cir. 1975), announcing that when a defendant wishes to plead guilty, the court must mention specifically any aspect of sentencing that directly affects the amount of time spent in prison. This referred especially to the Special Parole term at issue in the instant case.

As a corollary, pleas induced in part by promises of recommendations may be vacated if the promises are not fulfilled. Santobello v. New York, 404 U.S. 257 (1971) "When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promises must be fulfilled." Id. at 262. This was extended to the promises of counsel McAleney v. United States, 539 F.2d 282.

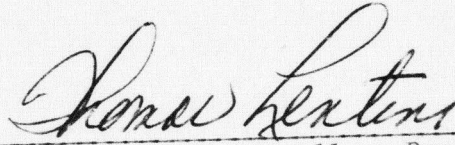
THEREFORE, for all of the above the Appellant prays the Court reverse the decision of the Court below and remand for an Evidentiary Hearing.

October 27, 1977.


Thomas Lentini, Appellant Pro Se

PROOF OF SERVICE

I, HEREBY CERTIFY, that I am the Appellant in the foregoing Reply Brief of the appellant, and that I have served a copy of said brief on ROBERT B. FISKE, JR., United States Attorney for the Southern District of New York, New York City, by mailing same in the United States Mails at the United States Penitentiary, Atlanta, Georgia and sending it CERTIFIED MAIL-RETURN RECEIPT REQUESTED THIS 27 day of October, 1977.


Thomas Lentini, Appellant Pro SE.